No. 4028

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES C. DAVIS, Director General of Railroads, as Agent, pursuant to Section 211, Transportation Act, 1920,

Plaintiff in Error,

vs.

R. D. ADAMS,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR

Upon Writ of Error to the United States Circuit Court of Appeals, for the Ninth Circuit.

P. H. JOHNSON,
Attorney for Plaintiff in Error.

JAMES E. GOWEN,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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There are just two propositions, which defendant in error has sandwiched into his argument about "custom and method", "liability of warehouseman", "marshalling of assets", "liens on goods" and "subrogation" (all of which we contend are entirely immaterial and foreign to the question before the Court) that we deem necessary to consider especially in our closing brief. And those two propositions are:

I.

That the storage charges in question arose by virtue of a special contract with E. C. Humphreys Company; and,

II.

That said storage charges were not incidental to "freight charge".

First Proposition.

Defendant in error has wandered mentally far afield on both these propositions.

As to the first, of course, there is no evidence in the record which would justify the Court in taking any such stand. All the talk about "custom and method" of the E. C. Humphreys Company, and how it handled two other cars of chrome ore, has nothing at all to do with the transportation charges which we now seek to collect from the defendant in error, because the plaintiff in error ever looked to the defendant in error, who was at all times primarily liable for all the transportation charges in connection with this shipment, and there is no evidence here of any special contract by which the plaintiff in error agreed to release Adams and look to the E. C. Humphreys Company for the transportation charges, or any portion thereof; and because the evidence is conclusive that plaintiff in error had no knowledge or information of any kind whatever of any arrangement between Adams and the E. C. Humphreys Company, or of the issuance and payment of the draft mentioned. (Tr. "X" p. 27.)

True, defendant in error complains about our mention of this fact, saying:

> "Counsel in his brief keeps referring to the lack of knowledge of the plaintiff of the transaction between Humphreys Company and Adams";

and that

> "The paragraph in the stipulation stating that it had no knowledge *obviously* means that it had no knowledge prior to January 8, 1919."

But it seems very clear to us that the paragraph in question means just what it says:

> "That the said plaintiff herein had no knowledge or information of any kind whatever of any arrangement between the defendant, R. D. Adams, and the E. C. Humphreys Company or of the issuance and payment of the draft mentioned and set out in paragraph IX hereof."

It seems to be couched in ordinary English words with no hidden meaning at all and we take it that "no knowledge" means no knowledge and if it did not mean that, then defendant in error should have placed his construction on this paragraph before it went into the admitted statement of facts.

Is it a novel construction to contend that the English language is entirely adequate when applied to paragraph "VII" of the admitted statement of facts and entirely lacking in expressive force when applied to paragraph "X" of the same document?

But, aside from this, there is an uncomfortable dearth of evidence in the record of any special con-

tract which would prevent the plaintiff in error in this case from electing to look to, and collect from the party whose duty it was to pay.

Second Proposition.

The answer to the second proposition is a reference to the first brief of plaintiff in error and the cases cited therein, among others, the *Dettlebach* case, 239 U. S. 453 at 457; the *Lehigh* case, 188 Fed. 879 at 885-6; and the *Timmonsville* case, 258 Fed. 470 at 472-4—pages 23, 24, 25 and 26 of opening brief.

There it is held that "transportation" embraces all services in connection with a shipment, including storage of goods after arrival at destination.

A reading of the above authorities seems clearly to settle this proposition adversely to defendant in error.

And, if defendant in error feels that he is being overcharged or that "equity is not being done", as is contended in his brief, then we say there has been provided a way for him to protect his rights in such case, to-wit, an application first to the Interstate Commerce Commission for his relief, as this Court is without jurisdiction to consider that question here, and we refer again, in this connection, to the cases cited in our opening brief on page 29 thereof.

Admissions on Part of Defendant in Error.

In his brief defendant in error admits:

1. That, as shipper and consignor of this chrome ore, defendant in error has always been liable for freight charges thereon. (Defendant's Brief, page 6.)

2. That the word "transportation" includes all services incidental to the handling of freight, including storage. (Defendant's Brief, page 8.)

3. "That, while there is very little authority on this question, the cases which we have found, *which are at all in point,* sustain this position." (Defendant's Brief, page 10.)

4. That his authorities are "somewhat in point". (Defendant's Brief, page 13.)

5. That defendant in error was "technically liable to pay the freight because he was shipper". (Defendant's Brief, page 16.)

While we consider it the duty of attorneys presenting appeals to this Court, to always blaze the way to a rightful conclusion and to assist the Court to sift out the chaff from the wheat, yet it is clear in this case that it would be a reflection upon the intelligence of the Court were we to undertake to elucidate those matters contained in the brief of defendant in error, which are already clear and plain.

The court must necessarily read the brief of defendant in error and *to read it is to answer it.*

Without any implication of absurdity or any display of egotism whatever, we earnestly contend *that defendant in error has admitted himself out of Court* and we now ask that his admissions be confirmed; that the judgment of the District Court of the United States, in and for the Northern District of California, Second Division, be reversed and that said cause may be remanded to said Court, with instructions to enter judgment for the plaintiff in error in accordance with the prayer of said amended complaint.

Dated, San Francisco,
November 26, 1923.

Respectfully submitted,
P. H. JOHNSON,
Attorney for Plaintiff in Error.

JAMES E. GOWEN,
Of Counsel.